93-909

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

SAM F. LONG and ELMER J. CANTRELL,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari
To the United States Court of Appeals
for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. WHETHER LACK OF AUTHORIZATION ACCORDING TO A UNION'S CONSTITUTION AND BY-LAWS IS AN ESSENTIAL ELEMENT TO PROVE A VIOLATION OF 29 U.S.C. § 501(c), WHEN LACK OF AUTHORIZATION IS PLEAD AND CONTESTED.

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CITATIONS TO OFFICIAL REPORTS OF OPINIONS IN CASE

The Opinion of the United States Court of Appeals for the Eighth Circuit, whose judgment is herein sought to be reviewed, was decided and filed on July 30, 1993. The opinion is reported as *United States v. Cantrell*, 999 F.2d 1290 (8th Cir. 1993), and set forth in the Appendix at App. 1 through App. 7. The Opinion of the United States District Court for the Western District of Missouri granting Petitioners' Motions for Judgment of Acquittal was decided and filed on December 5, 1990. The opinion is reported as *United States v. Long*, 757 F. Supp. 1038 (W.D. Mo. 1990), and set forth in the Appendix at App. 35 through App. 49. The judgments of acquittal entered by the district court were overturned and the jury verdicts affirmed by the United States Court of Appeals for the Eighth Circuit and filed on December 21, 1991. The opinion is reported as *United States v. Long*, 952 F.2d 1520 (8th Cir. 1991), *cert. denied*, 113 S.Ct. 298 (1992), and set forth in the Appendix at App. 8 through App. 34.

STATEMENT OF JURISDICTION

The appeal of *United States v. Cantrell* was decided by a panel of the United States Court of Appeals for the Eighth Circuit on July 30, 1993. Timely petitions for rehearing were filed. Said petitions for rehearing were denied on September 7, 1993. The Supreme Court of the United States has jurisdiction to review this Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1254(1) (1988).

CONSTITUTIONAL PROVISIONS AND STATUTES

29 U.S.C. § 501 Fiduciary Responsibility of Officers of Labor Organizations

(c) embezzlement of assets; penalty

Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both. 29 U.S.C.A. § 501(c) (Supp. 1992).

STATEMENT OF CASE

A. Procedural Statement of the Case

Plaintiff filed a ten-count Indictment on June 14, 1990. The federal district court's jurisdiction was pursuant to 28 U.S.C. § 1331(a). The grand jury charged Defendants Cantrell and Long on all counts and Defendant Quick on Counts One and Three through Seven.

Count One charged all three defendants with conspiring to obtain $10,000 from the International Union of Operating En-

gineers ("IUOE") for a Safety Program which was never implemented, in violation of 18 U.S.C. § 371. Count Two charged Long and Cantrell with conspiring to embezzle $10,000 from Local 101 to reimburse the IUOE's grant account, in violation of 18 U.S.C. § 371. Counts Three through Six charged all three defendants with receiving money unlawfully converted and taken by fraud from the IUOE, in violation of 18 U.S.C. §§ 2, 2314, 2315, and unlawfully transporting checks in interstate commerce in violation of 18 U.S.C. §§ 2 and 2314. Count Seven charged Cantrell with embezzling money from the Missouri State Building Construction and Trades Council ("Trades Council"), and Quick and Long in aiding and abetting Cantrell in committing said acts, in violation of 29 U.S.C. § 501(c) and 18 U.S.C. § 2. Count Eight charged Long with embezzling assets of Local 101, and Cantrell for aiding and abetting Long, in violation of 29 U.S.C. § 501(c) and 18 U.S.C. § 2. Count Nine charged Long with embezzling $10,000 from Local 101 and Cantrell with aiding and abetting Long, in violation of 29 U.S.C. § 501(c) and 18 U.S.C. § 2. Count Ten charged Cantrell with unlawfully transporting a $10,000 check, containing at least $5,000 of funds embezzled from the Trades Council, and Long for aiding and abetting Cantrell, in violation of 18 U.S.C. §§ 2 and 2314.

The trial by jury began on September 17, 1990. On September 27, 1990, the jury returned their verdict convicting Cantrell and Long on Counts Two, Nine and Ten. Cantrell and Long timely filed a Motion for Judgment of Acquittal, Arrest of Judgment, and New Trial on October 29, 1990. Upon consideration of their motion and the material filed by the parties, the district court granted the Motion for Judgment of Acquittal, ruling there was insufficient evidence to convict Cantrell and Long of Counts Two, Nine and Ten, on December 5, 1990. *United States v. Long*, 757 F. Supp. 1038 (W.D. Mo. 1990).

Plaintiff timely filed its notice of appeal on December 14, 1990. The Eighth Circuit entered its opinion affirming the jury verdict on December 12, 1991. The Defendants, separately and timely, filed Petitions for Rehearing which were denied on February 21, 1992. The Defendants then filed a Petition for Writ of Certiorari. In response to the Petition, the government argued the case was not ripe for consideration by this Court because the jury verdicts had been reinstated and Defendants had not yet been sentenced nor final judgment entered. The Petition for Writ of Certiorari was denied on October 5, 1992. *United States v. Long*, 952 F.2d 1520 (8th Cir. 1991), *cert. denied*, 113 S.Ct. 298 (1992). The issue presented in this Petition was raised, in a similar form, in the petition filed in 1991, case no. 91-1876.

Defendants were sentenced and judgment was entered on October 30, 1992. Defendants timely filed, separately, notices of appeal on October 30, 1992. The district court entered amended judgments on January 7, 1993. The cases were consolidated for purpose of appeal. The Eighth Circuit entered its opinion affirming the jury verdict on July 30, 1993. *United States v. Cantrell*, 999 F.2d 1290 (8th Cir. 1993). Defendants filed a Petition for Rehearing which was denied on September 7, 1993.

B. Factual Statement of the Case

Local 101 is a labor union affiliated with the AFL-CIO. Its offices are in Kansas City, Missouri. Its president and business manager, at all times relevant hereto, was Long.

Article XXIV of the constitution provides the laws, rules and procedures by which locals will conduct their affairs. Subdivision 1, section (a) of this article provides that a local may provide for a business manager in its bylaws. Local 101

so provided. This section of the constitution states that the business manager shall be the "chief executive officer" of the local. The constitution spells out the specific duties and responsibilities of each of the officers of a local union. However, Local 101 operated through custom and practice, not always in strict compliance with the constitution's provisions. Jim Foster, treasurer of Local 101, testified Local 101 did not strictly follow the constitution regarding the collection of receipts and disbursements of funds.

The constitution required the president and treasurer sign off on all checks written by the union. However, because the president and treasurer were not always available when checks needed to be written, a signature stamp for each was developed and used as part of the custom and practice of the Local 101. Foster testified that checks were frequently written without his knowledge, because that was how Local 101 transacted business. Foster gave to the staff his authorization that his signature stamp could be used for check signing purposes. Vincent Angel, recording-corresponding secretary for the Local 101, testified that the use of the signature stamp procedure was done with the consent of the officers of Local 101.

At the end of each quarter, the treasurer is required to make an itemized statement and report to the Local Union. With respect to the $10,000 transaction in question, said transaction was not directly on the financial report made to the union monthly membership meeting. Foster testified that the full report is not read in its entirety, only summarized. Angel confirmed that the financial information presented to the membership was in summary fashion. Donald Shaw, financial secretary, confirmed that the custom and practice of Local 101 was to provide the membership with a summary of the financial transactions. Each transaction was not discussed, either at Executive Board meetings or at membership meetings, because

that would have been an impossibility, as in some months receipts and expenditures exceeded $200,000. Angel and Shaw testified that the report discussed at the executive board meetings was a summary of financial transactions. Foster testified that other transactions involving large sums of money were also not included on the report. For the period of time in question, pursuant to the reports generated by the computer and distributed and used at the executive board and membership meetings, Defendant and business manager Long's actions were approved by Local 101's executive board and membership at a regular meeting.

Regarding the issuance of checks, the president and treasurer were required to sign off on the checks. Signature stamps for both the president and the treasurer were available for use should the president or treasurer, or both, not be available at the time a check needed to be issued. This custom and practice was done with the consent of the officers. The financial secretary never signed a check voucher prior to the issuance of a check.

Although this $10,000 transaction was not directly itemized on the financial report read to the membership, there were many financial documents of Local 101 evidencing the transaction: a deposit slip showed the receipt of the $10,000 from Jorgensen; the financial books and records of the union were open to the Executive Board and never concealed from the membership; the cash receipts journal showed the deposit of the $10,000 from Jorgensen; the cash register; the cash disbursement and cash deposit journals; the bank statement for July, 1987 showed the $10,000 deposited as a reimbursable expense; the financial statement for July, 1987, and attached to the statement was the cash receipts journal evidencing the recording of the $10,000 transaction; and the general ledger for July, 1987.

REASONS FOR GRANTING THE WRIT

I. WHETHER LACK OF AUTHORIZATION ACCORDING TO A UNION'S CONSTITUTION AND BY-LAWS IS AN ESSENTIAL ELEMENT TO PROVE A VIOLATION OF 29 U.S.C. § 501(c), WHEN LACK OF AUTHORIZATION IS PLEAD AND CONTESTED.

Granting of a petition for writ of certiorari is proper, *inter alia*, when a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter or has decided an important question of federal law which has not been, but should be, settled by this Court. In this case, Petitioners assert a conflict exists between the circuit courts of appeals, and internally within the Eighth Circuit, on the issue of whether lack of authorization according to a union's constitution and by-laws is an essential element to prove a violation of 29 U.S.C. § 501(c), when lack of authorization was plead and contested.

29 U.S.C. § 501 governs the fiduciary responsibility of officers of labor organizations. 29 U.S.C. § 501(c) governs embezzlement of assets and penalties. Subsection c provides:

> Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the monies, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

Petition for Writ of Certiorari is sought for this Court to determine whether § 501(c) requires the government to prove beyond a reasonable doubt that the actions of an officer, or

employee of the union, were unauthorized according to a union's constitution and bylaws, when the government pleads and contests lack of authorization.

Since the mid-1970's, the circuit courts of appeals have debated what elements of proof constitute a violation of § 501(c). In 1974, the Eighth Circuit held that § 501(c) required union officials to (1) possess fraudulent intent, and (2) act without authorization according to union constitution and bylaws. *United States v. Goad*, 490 F.2d 1158, 1166 (8th Cir.), *cert. denied*, 417 U.S. 945 (1974). The First Circuit followed in *United States v. Sullivan*, 498 F.2d 146, 150-52 (1st Cir.), *cert. denied*, 419 U.S. 993 (1974), concluding no violation of § 501(c) occurs if there exists actual authorization according to the union's constitution or a good faith belief that the acts were authorized (i.e., lack of fraudulent intent). Other circuits have also followed *Goad*, holding that the government must prove lack of authorization according to union constitution and bylaws and fraudulent intent. *United States v. Busacca*, 863 F.2d 433, 436 (6th Cir. 1988); *United States v. Stockton*, 788 F.2d 210, 217 (4th Cir.), *cert. denied*, 479 U.S. 840 (1986); *United States v. Dixon*, 609 F.2d 827, 829 (5th Cir. 1980).

In 1984, the Eighth Circuit again examined the essential elements issue of a § 501(c) violation. *See United States v. Welch*, 728 F.2d 1113 (8th Cir. 1984). Recognizing its holding in *Goad* that both fraudulent intent and lack of authorization according to union constitution and bylaws were the elements of the offense, the *Welch* court stated that in *Goad* it expressly reserved the question whether a § 501(c) offense exists when there is fraudulent intent and proper authorization but lack of union benefit. *Welch*, 728 F.2d at 1117 (quoting from *Goad*, 490 F.2d at 1166). The court in *Welch* focused on this issue left open in *Goad* and concluded that when the union has authorized an union official's actions, he or she is not insulated from the reach

of § 501(c), rather the offense hinges on whether fraudulent intent exists.

Two circuits have reached the conclusion that lack of authorization is not an essential element of a § 501(c) violation. *United States v. Floyd*, 882 F.2d 235, 240 (7th Cir. 1989); *United States v. Thordarson*, 646 F.2d 1323, 1334-35 (9th Cir. 1981). In *Floyd*, the Seventh Circuit followed the rationale of *Welch*, while apparently not realizing that in *Welch*, the government conceded the authorization element. 882 F.2d at 239-41. In *Thordarson*, the Ninth Circuit held lack of authorization not an element and need not be plead in a § 501(c) prosecution, because lack of authorization did not have a counter-part in common law theft crimes or other federal theft statutes. 646 F.2d at 1334-35.

In *United States v. Long*, 952 F.2d 1520 (8th Cir. 1991), *cert. denied*, 113 S.Ct. 298 (1992), the Eighth Circuit recognized that *Goad* properly set forth the essential elements of a § 501(c) violation and, that the district court declined to follow *Goad* when it concluded lack of authorization was not an element of the offense. (App. 13-14). While the Eighth Circuit recognized the district court's error in concluding that lack of authorization according to the union's constitution and bylaws is not an essential element of a § 501(c) violation, the Eighth Circuit ignored the error. The appellate court ignored the error by stating the district court considered authorization as a factor on the issue of fraudulent intent. (App. 14).

In *United States v. Cantrell*, 999 F.2d 1290, 1292 (8th Cir. 1993), the Eighth Circuit stated that lack of union authorization is not necessarily an essential element of a Section 501(c) violation. (App. 4-5). The court stated that its definition of the essential elements of a Section 501(c) in *United States v. Goad*, 490 F.2d 1158 (8th Cir.), *cert. denied*, 417 U.S. 945 (1974), was

limited to the facts of that case. *Id.* Petitioners disagree. The Eighth Circuit created a limitation on the holding in *Goad* that did not otherwise exist. Nowhere within the discussion of a Section 501(c) violation, did the court in *Goad* limit its holding to the facts of that case. *Goad*, 490 F.2d at 1161-66.

In *Goad*, the defendant argued three elements were required for a 501(c) violation: 1) fraudulent intent; 2) unauthorized expenditure; and 3) lack of union benefit. 490 F.2d at 1161-66. The *Goad* court analyzed the language of the statute, reviewed the legislative history and relevant case law, and determined that "[t]he *unauthorized* expenditures of union funds with a fraudulent intent alone is exactly what the Act was attempting to reach." *Id.* at 1165 (emphasis added). The court did not limit the scope of its holding. However, it did leave open the question of whether there is a Section 501(c) violation when there has been a fraudulent intent and proper authorization, but a lack of union benefit. *Id.* at 1166. This question was the one addressed in *United States v. Welch*, 728 F.2d 1113 (8th Cir. 1984).

Completely opposite to what the Eighth Circuit held in *Cantrell*, the *Welch* holding is the one limited to the facts of its case. 999 F.2d at 1292. In *Welch*, there was no issue whether the union officials' acts were authorized, the government conceded that they were. 728 F.2d at 1117. The court indicated it was addressing the issued reserved for another day by the *Goad* court — could a § 501(c) violation exist when there was fraudulent issue and proper authorization but a lack of union benefit and held that there could be such a violation. *Id.* at 1116-17.

Contrary to the facts in *Welch*, the Indictment alleged Long's acts were unauthorized because done without knowledge and approval of the executive board; the government did not concede Long's acts were authorized; and Long presented

evidence that his actions were authorized according to the union's constitution and bylaws, as required by *Goad*, yet the district court held lack of authorization not an element of the offense. (App. 42-43). This holding was reached even though the issue of whether Long's acts were authorized remained a hotly contested issue throughout the case. While concluding lack of authorization was not an element, the district court subsequently, but improperly, instructed the jury that lack of authorization was an element of the offense, without (1) requiring the jury to find the acts unauthorized according to the union's constitution and bylaws and (2) indicating to the jury what facts it must find beyond a reasonable doubt to constitute a lack of authorization. (App. 42-43, 50). As stated above, the district court's reliance on *Welch* was misplaced and the Eighth Circuit erred in not correcting the error.

The Eighth Circuit in *Cantrell* cites *United States v. Stockton*, 788 F.2d 210 (4th Cir.), *cert. denied*, 479 U.S. 840 (1986), as one of the cases that do not include lack of union authorization as an essential element of a § 501(c) violation (App. 5). 999 F.2d at 1292. Petitioners respectfully disagree. The court in *Stockton* likens a § 501(c) offense to the traditional concept of embezzlement. *Id.* at 215-18. One of the elements of the traditional concept of embezzlement is an unauthorized appropriation of property belonging to another. *Id.* at 217. With respect to property of a union, an expenditure of union funds is unauthorized if done without the permission of the union. *Id.* The permission of the union is lacking when the expenditure "is outside the scope of the fiduciary trust placed in the defendant by the union as a whole." *Id.* As in *Goad*, the Fourth Circuit requires an expenditure of union funds to be unauthorized by the union. As in *Stockton*, the evidence of custom and practice established that Long's acts were not outside the scope of the fiduciary trust placed in Long by Local 101 as a whole. (*See*

Factual Statement of the Case above.)

Even if this court concludes that lack of authorization is not an essential element of a § 501(c) violation, Petitioners assert that because the Indictment alleged lack of authorization, lack of authorization became an essential element. *See United States v. Marolda*, 615 F.2d 867, 870-71 (9th Cir. 1980) (where the indictment alleges "without proper authorization and without benefit to said local", the government must prove such, or a variance occurs). Here, the district court did not require the government's proof to meet the allegations in the Indictment and therefore, a new trial should be granted.

In *Cantrell*, the court held that whether union authorization is a necessary element to a § 501(c) offense is of no consequence because the government plead and proved lack of union authorization. 999 F.2d at 1292. Petitioners disagree. Count II of the Indictment alleged Defendant Long acted "without the knowledge and approval of the Local 101 executive board." The court rationalized that "the government's allegation that Long did not have executive board approval is the same as saying that Long acted without union authorization according to the Union's constitution and bylaws." *Id.* Nothing within Local 101's constitution and bylaws requires executive board approval for the acts Long performed. Additionally, during the course of the trial, the district court held that the government's theory on lack of authorization was not properly plead, yet refused to dismiss the charges. However, the trial court refused to allow the government to put on such evidence because the union's constitution and bylaws did not require approval by the executive board for Long's actions.

CONCLUSION

In this Petition for Writ of Certiorari, Petitioners respectfully request this Court determine whether lack of authorization according to union constitution and bylaws is an essential element to convict a person of a violation of 29 U.S.C. § 501(c), when lack of authorization is plead and contested. By submitting this Petition for Writ of Certiorari, Petitioners respectfully request the Court resolve the conflict that exists between the United States courts of appeals. Also, the issue is an important question of federal law which has not been, but should be, settled by this Court. This case raises an issue that makes consideration by this Court necessary to secure and maintain uniformity of court decisions regarding federal law and presents an issue of exceptional importance to union leaders and union members and others throughout the United States.

WHEREFORE, for the foregoing reasons, Petitioners respectfully request this Court grant their Petition for Writ of Certiorari.

Respectfully submitted,
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UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 92-3577

United States of America,
Plaintiff - Appellee,

v.

Elmer J. Cantrell, also
known as Lucky,
Defendant - Appellant.

Appeals from the United States
District Court for the
Western District of Missouri.

No. 92-3581

United States of America,
Plaintiff - Appellee

v.

Sam F. Long,
Defendant - Appellant.

Submitted: April 12, 1993
Filed: July 30, 1993

Before JOHN R. GIBSON, LOKEN, and HANSEN, Circuit Judges.

JOHN R. GIBSON, Circuit Judge.

Sam F. Long and Elmer J. Cantrell appeal from their convictions for conspiring to embezzle money from a union in violation of 18 U.S.C. § 371 (1988), embezzling money from a union in violation of 29 U.S.C. § 501(c) (1988) and 18 U.S.C. § 2 (1988), and unlawfully transporting stolen money in violation of 18 U.S.C. §§ 2 and 2314 (Supp. III 1991). A jury convicted Long and Cantrell on these counts, but the district court[1] ordered acquittals because of insufficient evidence of fraudulent intent. *United States v. Long*, 757 F. Supp. 1038 (W.D. Mo. 1990). We reversed the district court's order of acquittals and affirmed the jury's convictions in *United States v. Long*, 952 F.2d 1520 (8th Cir. 1991), *cert. denied*, 113 S.Ct. 298 (1992). The district court then sentenced Long and Cantrell to two years probation and 200 hours of community service. Long and Cantrell appeal, arguing that their convictions should be reversed because: (1) the government failed to properly plead and prove lack of union authorization; (2) the district court erred in excluding expert testimony; and (3) the government failed to prove that the Missouri State Building and Construction Trades Council was a "labor organization" as defined in 29 U.S.C. § 402(i)-(j) (1988). We affirm the convictions.

The facts leading to the convictions in this case are set forth in our earlier opinion, *see Long*, 952 F.2d at 1522-23, and need not be repeated here. In short, Long and Cantrell were convicted for taking $10,000 from Local 101 and using the money to reimburse the international union for a grant to establish a non-existent safety program.

Long and Cantrell first argue that lack of union authorization is an essential element of a 29 U.S.C. § 501 (c) violation, and that the government failed to properly plead or prove this

1 The Honorable Scott O. Wright, Senior United States District Judge for the Western District of Missouri.

element of the case. For support, Long[2] cites *United States v. Goad*, 490 F.2d 1158 (8th Cir.), *cert. denied*, 417 U.S. 945 (1974), a case in which we defined the essential elements of a section 501(c) crime to include: "lack of authorization according to the union's constitution and bylaws." *Id.* at 1166.

We reject Long's argument. First, whether union authorization is a necessary element is of no consequence here. The government pled and proved lack of union authorization and the jury found lack of union authorization by their conviction. Count II of the indictment alleged:

> It was a part of the conspiracy that defendant SAM F. LONG would and did, *without the knowledge or approval of the Local No. 101 executive board*, arrange for and sell assets of Local No. 101 for the total sum of $10,000, which sum he thereafter deposited and caused to be deposited to Local No. 101 bank account on or about July 16, 1987.
>
> It was further a part of the conspiracy that defendant SAM F. LONG, on or about July 21, 1987, would and did, *without the knowledge or approval of the Local No. 101 executive board*, issue and caused to be issued a check for $10,000 from Local No. 101 and payable to the Missouri State Building Trades Safety Program.

(Emphasis added).

> Similarly, the court instructed the jury that to prove a section 501(c) violation, the government must prove:

2 We will refer to Long and Cantrell as simply Long.

> . . . that defendant Sam F. Long, *without authorization*, embezzled, stole, or unlawfully and willfully abstracted or converted to his own use or the use of another, the moneys, funds, property and assets of local 101 . . .

(Emphasis added).

Long contends that the indictment and instructions[3] are nevertheless defective because they do not say that the money was taken without authorization according to the Union's constitution and by-laws. The indictment specifically states, however, that Long took money without the knowledge or approval of the union's executive board. The union's constitution and by-laws identify the executive board members, specify their duties, and show that the executive board must know and approve of the Union's expenditures. Thus, the government's allegation that Long did not have executive board approval is the same as saying that Long acted without union authorization according to the Union's constitution and by-laws. Moreover, the instruction provided amply instructed the jury on the elements of a 501(c) violation. Indeed, the instruction held the government to an increased burden as it required a finding of no union authorization which, as we will further explain, is not a necessary element to a section 501(c) violation. Finally, there was sufficient evidence for the jury to find that Long acted without union authorization. This evidence is recounted in detail in our first opinion. *See Long*, 952 F.2d at 1525-27.

Moreover, lack of union authorization is not necessarily an essential element of a section 501(c) violation. We limited our

3 Long concedes that the failed to object to this instruction at trial, but argues that plain error occurred.

definition of the essential elements of a section 501(c) violation in *Goad* to that case. *Id.* (limiting definition of essential elements to "*this* case"). We explained the limits of *Goad* in *United States v. Welch*, 728 F.2d 1113, 1117 (8th Cir. 1984). Indeed, the union in *Welch* had passed a resolution authorizing the actions the defendants were being prosecuted for, and we clarified the elements of a section 501(c) violation by explaining that the government must only prove fraudulent intent, and that union authorization is "evidence bearing on 'fraudulent intent.'" *Id.* at 1117-18. We detailed the evidence supporting the jury's finding of fraudulent intent against Long and Cantrell in our first decision. *Long*, 952 F.2d at 1525-29.

Other circuits have not included lack of union authorization as an essential element of a section 501(c) violation. *See, e.g., United States v. Butler*, 954 F.2d 114, 118 (2d Cir. 1992) (union authorization is one of the controlling lodestars to determine whether a defendant acted with fraudulent intent); *see also United States v. Stockton*, 788 F.2d 210 (4th Cir.), *cert. denied*, 479 U.S. 840 (1986). The D.C. Circuit recently considered the question of union authorization with respect to a section 501(c) violation, and did not suggest that lack of union authorization was a necessary element. United States v. *Lawton*, No. 92-3194, 1993 U.S. App. LEXIS 13769 (D.C. Cir. June 15, 1993). In that case, the district court had instructed the jury that union authorization was an affirmative defense to a section 501(c) violation. On appeal, however, the government argued that union authorization is not an affirmative defense but only a factor to be considered in determining fraudulent intent. *Id.* at *16. The court did not decide the question because it reversed the convictions based on a defective indictment. *Id.*

Long next argues that the court erred in excluding the expert testimony of Louie A. Wright, who would have testified that the Union's constitution and by-laws authorized

Long's actions.

A district court has broad discretion to admit or exclude expert testimony, and we will sustain that decision unless it was "manifestly erroneous." *United States v. Sparks*, 949 F.2d 1023, 1026 (8th Cir. 1991), *cert. denied*, 112 S.Ct. 1987 (1992). The district court did not err in excluding Wright's testimony. Lack of union authorization was not an essential element of the case, see *supra*, and Wright's testimony would not have assisted the jury. Moreover, the subject matter of Wright's intended testimony was within the jury's knowledge or experience, and thus was not an appropriate subject for expert testimony. Fed. R. Evid. 702; *cf. Sparks*, 949 F.2d at 1026. The Union's constitution and by-laws were in evidence and there was substantial evidence about the union's custom and practice. The jury could determine this issue without expert assistance, and we also question the relevance of this testimony. Fed. R. Evid. 402. The district court did not err in excluding this testimony.

Finally, Long contends that the government failed to prove that the Missouri State Building and Trades Council was a labor organization under 29 U.S.C. § 402(j). We stated in our earlier opinion that this question was "not critical" because Long's conviction on Count II concerned embezzling from Local 101, not the Trades Council. 952 F.2d at 1530 & n.4. The jury acquitted Long on the counts relating to embezzlement from the Trades Council (Counts I and VII). Thus, the question is not relevant to this appeal.

We affirm Long and Cantrell's convictions.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-3063

United States of America,
Appellant,

v.

Sam F. Long,
Appellee.

Appeal from the United States
District Court for the
Western District of Missouri.

United States of America,
Appellant,

v.

Elmer J. Cantrell,
Appellee.

Submitted: June 13, 1991
Filed: December 12, 1991

Before JOHN R. GIBSON, Circuit Judge, ROSS, Senior Circuit Judge, and LOKEN, Circuit Judge.

JOHN R. GIBSON, Circuit Judge.

The United States appeals from an order acquitting Sam F. Long and Elmer J. Cantrell of conspiring to embezzle money from a union in violation of 18 U.S.C. § 371 (1988), of embezzling money from a union in violation of 29 U.S.C. § 501(c) (1988) and 18 U.S.C. § 2 (1988), and of unlawfully transporting stolen money in violation of 18 U.S.C. § 2314 (1988). A jury convicted Long and Cantrell on these three counts, and the district court ordered acquittals on the grounds of insufficient evidence. The jury also acquitted Long, Cantrell, and Edward E. Quick on seven other charges. On appeal, the government argues that the district court erred by considering only the evidence relating to the counts on which the jury convicted Long and Cantrell, and that sufficient evidence existed to support the convictions on all three counts. The government also argues that the district court erred by conditionally ordering a new trial to determine whether there was one conspiracy or multiple conspiracies. We reverse the order of acquittals and the conditional grant of a new trial.

Long was president and business manager of Local 101, a labor union affiliated with the AFL-CIO. Local 101 is located in Kansas City, Missouri, and is a member of the Missouri State Building and Construction Trades Council and the International union of Operating Engineers. The Trades Council is a labor organization composed of representatives of various building and trades unions and councils, and is located in Jefferson City, Missouri. Elmer J. Cantrell was president of the Trades Council. Cantrell was also a member of the Missouri House of Representatives. The International is an international union comprised of local unions, and is headquartered in Washington, D.C.

In early 1985, Long approached the Director of the Department of Safety and Health for the International, A. Bennett Hill, Jr., requesting money to promote safety programs in

Missouri. Long wanted to implement a cooperative labor-management safety program. Hill told Long that the Trades Council should apply for its own grant from OSHA. Hill received a copy of an application for an OSHA grant signed by Cantrell, and Hill understood that the Trades Council filed the grant application with OSHA, but that OSHA would not fund the program. There was evidence, however, that the Trades Council never filed the application with OSHA. Sometime later, Hill sent Long two $5,000 checks from the International's OSHA grant funds as "seed money" for the Missouri program. The checks were payable to the "Missouri State Building Trades Safety Program."

Long delivered the checks to Edward E. Quick. Quick was a member of the Missouri Senate. Long asked Quick to be the director of the safety program. Cantrell and quick opened a checking account under the name of "Missouri Building and Trades Council Safety Program," with themselves as signatories, and deposited the $10,000 received from the International in the account. In January 1986 Cantrell and Quick began writing themselves salary checks from the account. By the end of March 1986, the account had been reduced to a balance of approximately $557, which the two then divided between themselves. All told, Quick received approximately $6,500 of the $10,000 and Cantrell received approximately $3,500.

In late May 1986, OSHA audited the International's grant account and disallowed the $10,000 disbursement to the Trades Council. OSHA informed Hill that the money would have to be returned to the International's grant account. Hill told this to Long, and Long assured Hill that the money would be returned. Long stated that the Trades Council did not have the money, but that he would find a way to provide it. Long told Cantrell and Quick that the International needed the money returned. Long told Cantrell that Local 101 would

reimburse the money.

In August 1985, a model of a crane and display boards had been prepared for a press conference following a fatal crane collapse on a construction project in Kansas City, Missouri. In the summer of 1987, Long sold these items to a safety consultant, Ernest Jorgensen, an owner and employee of Professional Safety Consultants, Inc., who did some work for the International. Jorgensen sent Long two checks from Professional Safety Consultants, one in the amount of $6,200 for the model and display boards, and another $3,800 check for additional materials consisting of photographs of the crane accident, miscellaneous news clippings, legal pleadings, and a copy of a trade publication. These two checks were deposited in Local 101's bank account on July 16, 1987. On July 21, 1987, at Long's direction, Local 101 sent a $10,000 check to the Trades Council. The Trades Council deposited the $10,000 check into its general account, and at Cantrell's direction, sent a $10,000 check to the International.

This brief outline of events, which we will supplement as necessary in this opinion, led to the filing of a ten-count indictment against Long, Cantrell, and Quick. Count I charged all three defendants with conspiring to obtain $10,000 from the International for a safety program which was never implemented, in violation of 18 U.S.C. § 371. Counts III through VI charged all three defendants with receiving money unlawfully converted and taken by fraud from the International, in violation of 18 U.S.C. §§ 2, 2314, 2315, and unlawfully transporting checks in interstate commerce in violation of 18 U.S.C. §§ 2 and 2314. Count VII charged Cantrell with embezzling money from the Trades Council, and Quick and Long in aiding and abetting Cantrell in committing that offense, in violation of 29 U.S.C. § 501(c) and 18 U.S.C. § 2. Count VIII charged Long with embezzling assets of Local 101 (specifically, the

model, display boards, carrying case, and file of photos and clippings), and Cantrell with aiding and abetting Long in committing that offense, in violation of 29 U.S.C. § 501(c) and 18 U.S.C. § 2.

The remaining counts of the indictment charged a separate conspiracy involving only Long and Cantrell. Count II charged Long and Cantrell with conspiring to embezzle $10,000 from Local 101 to reimburse the International's grant account, in violation of 18 U.S.C. § 371. Count IX charged Long with embezzling $10,000 from Local 101 and Cantrell with aiding and abetting Long in committing that offense, in violation of 29 U.S.C. § 501(c) and 18 U.S.C. § 2. Count X charged Cantrell with unlawfully transporting a $10,000 check, containing at least $5,000 of funds embezzled from the Trades Council and Long with aiding and abetting Cantrell in committing that offense, in violation of 18 U.S.C. §§ 2 and 2314.

A jury acquitted all three defendants of the charges relating to the first conspiracy (Counts I, III-VIII). The jury convicted Long and Cantrell on the charges relating to the second conspiracy. (Counts II, IX and X).

The district court granted Long and Cantrell's motion for an acquittal. *United States v. Long*, No. 90-00116-01/03-CR-W-5, slip op. at 19-20 (W.D.Mo. Dec. 5, 1990). The court also ruled that its failure to give two of defendants' instructions on the issue of multiple conspiracies constituted sufficient error to merit a new trial, but that the issue was moot because of the acquittals. *Id.* at 19. This was, in effect, a conditional grant of defendants' motion for new trial should-the acquittal be set aside on appeal. Fed. R. Crim. P. 29(d). The government appeals the order of acquittals and conditional grant of anew trial.

I.

The government argues that the district court erred by considering only the evidence relating to the counts on which Long and Cantrell were convicted in determining whether sufficient evidence existed to support the jury's convictions, and that sufficient evidence existed to support the convictions.

The district court first considered the evidence relating to Count IX. Count IX charged that Long embezzled money from Local 101, a labor organization, in violation of 29 U.S.C. § 501(c) and 18 U.S.C. § 2.[1] Section 501(c) holds union officers criminally liable when they embezzle, steal, or unlawfully and willfully abstract or convert a union's funds to their own use or the use of others. *United States v. Welch*, 728 F.2d 1113, 1116 (8th Cir. 1984). "To prove 'willfulness' under section 501(c), the government must show that the union officials possessed fraudulent or criminal intent to deprive the union of its funds." *Id.* Willfulness may be "proved by showing that defendant 'was sufficiently aware of the facts to know that he acted wrongfully and in contravention of the trust placed in him by the union and its members.'" *Id.* (quoting *United States v. Belt*, 574 F.2d 1234, 1238 (5th Cir. 1978)).

This court in *United States v. Goad*, 490 F.2d 1158 (8th Cir.), *cert. denied*, 417 U.S. 945 (1974), held that the elements of a case intent to deprive under 29 U.S.C. § 501(c) are: " (1) fraudulent the union of its funds and (2) lack of authorization according to the union's constitution and bylaws." *Id.* at 1166 (footnote

1 29 U.S.C. § 501 (c) provides:

Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organizatin of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

omitted). The district court here declined to follow *Goad*, concluding that lack of authorization was not an essential element of a 501 (c) offense. Slip op. at 9. The court reached this conclusion by relying on *Welch*. In *Welch*, we rejected the union's argument that the government may prove fraudulent intent under section 501(c) by showing that the conduct did not benefit the union, as intent could not be demonstrated "solely upon proof of an objective criterion." 728 F.2d at 1118. Thus, even though the district court concluded that union authorization or union benefit did not control the question of whether a section 501(c) violation occurred, the court considered those factors relevant to the issue of fraudulent intent. Slip op. at 9-10.

The district court then considered whether sufficient evidence existed to establish fraudulent intent under section 501(c). The court found no dispute that Local 101 sent $10,000 to the Trades Council to reimburse the International, and that neither Long nor Cantrell received any portion of the $10,000 the Trades Council sent to the International. *Id.* at 11. The court stated that although the $10,000 transaction may not have followed the precise duties required by Local 101's constitution and bylaws, the means of recording the transaction were the same as used for every Local 101 financial transaction. *Id.* at 11-12. The court concluded that lack of compliance with the constitution and bylaws could not be used to infer fraudulent intent, as no evidence existed that Long attempted to hide the reimbursement or that the transaction differed from Local 101's usual means of effecting transactions. *Id.* at 12.

The district court also ruled that fraudulent intent could not be inferred merely because Local 101 paid the money back to the International. *Id.* The court reasoned that although Local 101 had no legal obligation to reimburse the International, Local 101 did have a moral obligation to do so because Local 101, through Long, played a role in obtaining the funds

from the International, and as a member of both groups, "had at least a moral interest in the reputation and well-being of both organizations." *Id.* at 13. Based on these findings, the court concluded that there was insufficient evidence that Long possessed fraudulent intent in directing Local 101 to reimburse the International, and therefore, Long was entitled to judgment of acquittal on Count IX. *Id.*

The district court correctly stated the standard that governed its consideration of the sufficiency of the evidence. The same standard governs this court. The district court stated:

> The defendant's conviction must be upheld if, after viewing the evidence in the light most favorable to the government, there is substantial evidence to support the jury's verdict. In reviewing the guilty verdict, we must give the government the benefit of all inferences that may be reasonably drawn from the evidence. The evidence need not exclude every reasonable hypothesis of innocence, but must simply be sufficient to convince the trier of fact beyond a reasonable doubt that the defendant is guilty. If the evidence rationally supports two conflicting hypotheses, the reviewing court will not disturb a conviction. Moreover, the . . . court must keep in mind that the standard to be applied to determine the sufficiency of the evidence is a strict one, and the finding of guilt should not be overturned lightly.

Id. at 6-7 (quoting *United States v. Schubel*, 912 F.2d 952, 955 (8th Cir. 1990) (citations omitted)). *See also Glasser v. United States*, 315 U.S. 60, 80 (1942).

The government first argues that the district court erred by failing to consider all of the evidence at trial. The government contends that in ordering acquittals on Counts II, IX, and X, the district court considered only the evidence relating to those

counts, and did not consider the evidence relating to those counts in which the jury acquitted Long and Cantrell.

Long and Cantrell do not argue that the district court correctly considered only the evidence relating to the counts in which they were convicted. Instead, pointing to various statements the district court made, they say that it considered all of the evidence in ruling that insufficient evidence existed to prove fraudulent intent.

This court in dealing specifically with charges of converting union funds in violation of 29 U.S.C. § 501(c) and conspiring to violate that statute, made clear that the jury is to "determine fraudulent intent on the basis of 'all the evidence considered together' and in light of 'all the surrounding circumstances.'" *Welch*, 728 F.2d at 1119 (citing *Morissette v. United States*, 342 U.S. 246, 275-76 (1951)). The Supreme Court also instructed in *Jackson v. Virginia*, 443 U.S. 307 (1979), that the sufficiency of the evidence review involves assessment of "all of the evidence." *Id.* at 319 (emphasis in original). In considering the sufficiency of evidence as to certain counts, this court recently considered evidence relating to counts on which a defendant was acquitted. *United States v. Liebo*, 923 F.2d 1308, 1311 (8th Cir. 1991). In so ruling, we relied on *United States v. Powell*, 469 U.S. 57 (1984), in which the Supreme Court observed that in assessing the sufficiency of evidence, we independently review "the jury's determination that evidence on another count was insufficient." *Id.* at 67. *Accord United States v. Alanis*, 945 F.2d 1032, 1035 (8th Cir. 1991); *United States v. Reed*, 875 F.2d 107, 112 (7th Cir. 1989); *United States v. Finkelstein*, 526 F.2d 517, 527 (2d Cir. 1975), *cert. denied*, 425 U.S. 960 (1976).

Based on the district court opinion before us, it is difficult to determine whether the district court, in concluding that

insufficient evidence of fraudulent intent existed, considered all of the evidence adduced at trial or only the evidence relating to the counts in which the jury returned convictions. Nevertheless, even examining the evidence specifically relating to the charges of which Long and Cantrell were convicted, we are convinced that sufficient evidence existed to support the jury's finding of fraudulent intent.

Intent is an issue that turns in large part on the credibility and demeanor of witnesses, and is peculiarly within the province of the factfinder. *United States v. Reeves*, 730 F.2d 1189, 1195 (8th Cir. 1984); *see also Welch*, 728 F.2d at 1119; *United States v. Singer*, 660 F.2d 1295, 1302 (8th Cir. 1981), *cert. denied*, 454 U.S. 1156 (1982). The jury must determine the issue of intent from all the circumstances of the case because the element of knowledge is rarely capable of direct proof. *Reeves*, 730 F.2d at 1195. "Any uncertainty concerning the willful intent to commit the act is for the jury to resolve." *United States v. LeRoy*, 687 F.2d 610, 617 (2d Cir. 1982), *cert. denied*, 459 U.S. 1174 (1983).

Applying these principles, we are satisfied that sufficient evidence existed to support the jury's finding of Long's fraudulent intent. We have already detailed Hills' demand to Long that the money be returned to the International, Long's response that he would find a way to provide it, his telling Cantrell and Quick of the demand, and his telling Cantrell that Local 101 would reimburse the money.

Long then sold the model crane and display boards to Jorgensen. On May 18, 1987, Jorgensen sent Long a $6,200 check payable to "Local union 101 — IUOE" for these items. On May 28, 1987, Long sent a letter to Hill telling him that he would be receiving a $10,000 check from the Trades Council within the next thirty days. Long later offered Jorgensen additional materials about the crane collapse consisting of a file

of articles, photographs, and other miscellaneous materials. On July 9, 1987, Jorgensen sent Long a $3,800 check payable to "Local Union 101 — IUOE" for these items. The letter accompanying the check stated the payment was for materials relating to the "Hyatt Regency disaster." However, no such materials were delivered to Jorgensen.

Both checks were deposited in Local 101's bank account on July 15, 1987. On July 21, 1987, Long directed Marie Plummer, Local 101's bookkeeper, to issue a $10,000 check to the "Missouri State Building Trades Safety Program." Long told Plummer that Local 101 would be reimbursed for the $10,000. Plummer recorded the check in Local 101's financial records as a "reimbursable expense." The check was signed by Long and a facsimile stamp was used for the signature of Local 101's treasurer, John Foster.

Donna Sanford, Cantrell's personal secretary and secretary for the Trades Council, testified that on July 22, 1987, she was given a $10,000 check from Local 101 for deposit, and at Cantrell's direction, she issued a $10,000 check to the International on July 24, 1987. Sanford asked Cantrell how to list the check on the financial report, and she recorded the transaction as a "special fund in" and "special fund out." Sanford also asked Trades Council's accountant how to record the transaction, and the accountant confirmed that she had properly recorded the transaction.

The Trades Council minutes reflect that Long attended a meeting of the Trades Council in Jefferson City, Missouri, on July 22, 1987, the same day that the Trades Council received the $10,000 check from Local 101. Cantrell chaired this meeting. Neither Long nor Cantrell disclosed to the Trades Council that the International was demanding repayment of the $10,000 it sent to the Trades Council, that the Trades Council

had received $10,000 from Local 101, or that the Trades Council was going to send $10,000 to the International.

Local 101's bylaws state that the powers and duties of the officers are defined in the Constitution of the International. The duties of the treasurer include receiving and holding all funds collected by the financial secretary, giving receipts for such funds collected, and reporting on the financial condition and transactions of the union. The constitution prohibits the treasurer from disbursing union funds without the local union's approval and only upon the order of the president and recording secretary.

In addition, the constitution requires that the treasurer and president co-sign all checks, that the recording secretary sign all orders on the treasurer for checks, and that the financial secretary keep an accounting of all union finances. The constitution also provides that the trustees supervise the funds and properties of the union. John Foster, Local 101's treasurer, testified that he did not know that Local 101 received $10,000 from Jorgensen, or that Local 101 had sold the model crane or display boards. Foster also testified that he did not authorize or know that Local 101 sent $10,000 to the Trades Council, or of any obligation requiring Local 101 to send $10,000 to the Trades Council. Shaw, Local 101's financial secretary, testified that he did not know of any obligation or reason requiring Local 101 to send $10,000 to the Trades Council[2]. Roger

2 Shaw also admitted that "it would have been an impossibility" to report every receipt and expenditure to the Executive Board and membership. From this, Long argues that Shaw's testimony shows that the expenditure to the Trades Council was reflected according to Local 101's custom and practice and not evidence of fraudulent intent. Shaw, however, clarified this statement by agreeing that Local 101's sending of $10,000 to the Trades Council was an "unusual item." There was evidence that other non-recurring transactions such as the use of funds for the political contributions, advertising,

Kaminska, a trustee of Local 101, testified that he did not authorize or know that Long sold the model crane, display boards, or other items to Jorgensen.

Shaw testified about the procedures Local 101 used to report income and approve expenditures. He stated that he prepares a monthly financial report from the bookkeeper's information listing income and expenditures and submits the report to the Executive Board. The Executive Board then votes on whether to approve the payment of bills, and its action is recorded in the Executive Board minutes. The Executive Board minutes are then read to the general membership at the regular union meeting, and the general membership votes on whether to approve the Executive Board minutes. The checks from Jorgensen to Local 101 and the $10,000 check from Local 101 to the Trades Council were not reflected on Local 101's monthly financial report or in the Executive Board or union meeting minutes.

Long argues that the district court correctly concluded that the government failed to prove fraudulent intent. Long points to the following circumstances which he asserts conclusively establish a lack of fraudulent intent: (1) compliance with Local 101's customs and practices; (2) Local 101's documentation of the transactions; and (3) Local 101's obligation to reimburse the International. Long also points to the statements of Louie Wright, a labor union consultant, in an offer of proof, that Long's actions were authorized by the language and history of Local 101's constitution, and by Local 101's custom and practice.

charitable donations, and acceptance of an offer on a sale of property, were discussed and voted on in Executive Board meetings and general meetings.

It is true, as Long vigorously argues, that there was substantial evidence that Long complied with the custom and practice of Local 101 in recording the receipt of the $10,000 from Jorgensen, disbursing the $10,000 to the International, and reporting such information to the Executive Board and membership. For example, Foster (Local 101's treasurer) explained that he did not receive the monies for Local 101 or review the list of monies received, deposits made, or checks issued by the union, and that his signature stamp was often used to sign checks, despite the contrary requirements set forth in the constitution. There was also evidence explaining that Local 101's receipt of $10,000 from Jorgensen and issuance of $10,000 check to the Trades Council were reflected in underlying cash receipts and disbursement journals, check registers, and bank deposit slips, but were not reflected in the summarized financial reports because the transactions were a "wash."

Nevertheless, in light of the evidence recounted above, that the transactions in question were recorded consistently with Local 101's custom and practice does not in and of itself negate a jury finding of fraudulent intent. There was evidence that Long did not inform the union members about selling the model, display boards, and other items to Jorgensen for $10,000 and using the proceeds to reimburse the International, and that as president of the union, he was obligated to do so. From this evidence, a jury could reasonably infer that Long wrongfully, and in contravention of the trust placed in him by the union members, abstracted funds from Local 101. Moreover, the evidence that Long told Plummer the $10,000 Local 101 paid to the Trades Council was "reimbursable" makes the recording of the transaction suspect, and in itself creates evidence from which the jury could have inferred Long's intent to conceal the transaction from the union. The jury could reasonably have inferred that the $10,000 payment to the

Trades Council was not "reimbursable," but rather, Local 101's sale of union assets to Jorgensen and a transfer of the sale proceeds to the Trades Council.

Long relies on *United States v. Hart*, 417 F. Supp. 1314 (S.D. Iowa 1976), to support his position that his actions were authorized, and thus, he acted without the requisite fraudulent intent to violate section 501(c). In *Hart*, the government charged the president of a union with violating section 501(c) because he paid the legal fees and fines incurred by certain union members. *Id.* at 1315. The district court, after a bench trial, acquitted Hart holding that the government failed to prove fraudulent intent. In so ruling, the court found the following circumstances persuasive:

> All payments which are the subject of the indictment were openly and properly recorded in the union's ledger books. General discussions were had at board meetings regarding the pending criminal cases, and on one such occasion specific cases were discussed by the defendant. Whenever he was asked, the defendant fully answered any questions regarding the payments. There is simply no basis from which an intent to conceal facts from the union or deceive its members can be inferred.

Id. at 1322 (citation omitted).

Here, in contrast to the circumstances outlined in *Hart*, it is undisputed that Long never discussed with the union board, officers, or members the transactions in question. Moreover, *Hart* was tried before a district court judge, and the quoted passage does not deal with a jury finding of fraudulent intent. *Hart*, thus, is of no help to Long.

We also cannot conclude that Local 101's "moral obliga-

tion" to reimburse the International can necessarily negate the jury's finding of fraudulent intent. From the evidence outlined above, the jury could have reasonably inferred that Local 101 had no obligation to reimburse the International, and thus, the jury finding must stand. *See Schubel*, 912 F.2d at 955.

Facts that were more material to the counts of which Long and Cantrell were acquitted give further support to our conclusion that there was sufficient evidence for a jury to conclude that Long possessed the requisite fraudulent intent to deprive the union of its funds in violation of section 501(c). Long obtained $10,000 from the International and passed the money on to Cantrell for the safety program. The Trades Council minutes report only that Cantrell mentioned the possibility of getting an OSHA grant to initiate a safety program and that Cantrell was authorized to look into the matter and, if successful, proceed to initiate a program. Besides this brief mention, the minutes reflect nothing more about a safety program. Cantrell did not tell the Trades Council board or membership that the Trades Council received $10,000 from the International for a safety program, that a separate account had been opened with himself and Quick as signatories, or that the account had been depleted by salary expenditures to himself and Quick. Cantrell did not report on any activity associated with the safety program. Walter Roseburrough, a trustee, and three members of the Executive Board all testified that they were not aware of anything about a safety program beyond the minute reference in the council minutes.

The evidence about the work Cantrell and Quick performed for their "salaries" from the safety program monies also raises an inference of fraudulent activity. Cantrell claimed to have worked weekends and nights in January 1986 on a computer list of contractors which he gave to Quick. Quick claimed to have phoned four or five of the contractors, but he

could not recall any of the contractors' names. There was evidence which indicated that the contractor list Cantrell allegedly compiled had been prepared by contractor clerical staff and paid for by the Trades Council in their effort to keep abreast of identifying union contractors. Cantrell's Mastercard records reflected that he was not in Jefferson City, Missouri, during much of the time that he claimed to have been preparing or updating the list. Ellis, the secretary-treasurer for the Trades Council, who is required to co-sign all checks and make financial reports for the Trades Council, testified that he was unaware of a safety program, the existence of a separate bank account, the receipt of the two $5,000 checks used to open the account, or how the funds were spent. A number of representatives from the Missouri Builders Association testified about their interest in construction safety. They all testified that they knew or knew of Cantrell, Quick, and Long, and that they had not been contacted about a safety program and were unaware of the existence of the Trades Council safety Program.

From this evidence, the jury could reasonably question the propriety of the $10,000 in disbursements to Cantrell and Quick. Long had a hand in obtaining the $10,000 from the International, told the International that the money would be reimbursed, and told Cantrell that Local 101 would reimburse the International. This evidence, coupled with that we have discussed above, further supports the jury's finding of fraudulent intent.[3] Accordingly, we reverse the district court's order of acquittal of Long on Count IX.

3 Long argues that he acted in good faith, and thus, could not be found guilty of violating section 501(c). The court instructed the jury, however, that good faith was a complete defense to all charges, and the jury rejected this defense. In light of the evidence outlined, we reject Long's argument.

II.

The district court also acquitted Cantrell on Count IX. Slip op. at 13. The court concluded that Cantrell could not be guilty of aiding and abetting Long of violating section 501(c) when insufficient evidence existed that Long possessed the requisite fraudulent intent to violate section 501(c). *Id.* The court further stated that there was no evidence that Cantrell: (1) knew anything more than that Long was attempting to acquire funds to reimburse the International; or (2) knew how Long would obtain the funds. *Id.* at 14. The court concluded that Cantrell did not "'associate himself with the venture,'" and thus, could not be found guilty of aiding and abetting Long in violating section 501(c) (citing *United States v. Lard*, 734 F.2d 1290, 1298 (8th Cir. 1984)).

Cantrell argues that he cannot be found guilty of aiding and abetting Long in violating section 501(c) because: (1) Long had no fraudulent intent; and (2) Cantrell did not participate in the alleged embezzlement from Local 101 or know anything about the means of how the money would be reimbursed.

We reject Cantrell's first argument in light of our holding in Part I, *supra*. We also reject Cantrell's second argument because we are satisfied that sufficient evidence existed that Cantrell shared in Long's criminal intent. *Lard*, 734 F.2d at 1298 (to be guilty of aiding and abetting defendant must share in the principal's essential criminal intent). Cantrell received approximately $3,500 of the $10,000 received from the International. Cantrell knew that the International demanded the return of the $10,000, and that Local 101 would reimburse the $10,000 to the International. Cantrell knew that Local 101 sent $10,000 to the Trades Council for the purpose of reimbursing the International. Although Cantrell may not have known the exact means Long used to obtain the funds from Local 101, as

discussed, evidence existed from which the jury could have reasonably inferred that Local 101 had no obligation to reimburse the International for the safety program, and thus, that Long wrongfully obtained the funds from Local 101.

Moreover, from the evidence that local 101 officers (other than Long) did not know that Local 101 sent $10,000 to the International, did not authorize the expenditure, did not know about the safety program, and did not know about the need to reimburse the International, the jury could infer that the funds were wrongfully obtained from Local 101. The $10,000 check from Local 101 went into the Trades Council account and, pursuant to Cantrell's direction, was sent to the International without the knowledge of the officers or members of the Trades Council. As discussed, there was evidence that members of the Trades Council's executive board did not know about the existence of the safety program, the receipt of $10,000 from the International, that Cantrell and Quick opened a separate account, and depleted the account by making disbursements to themselves.

From this evidence, the jury could infer that Cantrell shared in Long's criminal intent, and thus, the district court erred in ordering Cantrell's acquittal on Count IX.

III.

The district court also concluded that there was insufficient evidence to support either Long or Cantrell's convictions on Count X. Count X charged that Long and Cantrell caused the Trades Council check to move in interstate commerce, knowing that the check had been stolen, converted, or taken by fraud. The court ruled that the evidence established only that Long sent a check from Local 101 to the Trades Council for the sole purpose of the Trades Council's sending the funds on to

the International. Slip op. at 14. The court observed that the government failed to prove the Trades Council's check was stolen as the deposit of the funds from Local 101 in the Trades Council's account did not make those funds the property of the Trades Council. *Id.* We believe it is for the jury to determine whether a check payable to the Trades Council, deposited in its account, constitutes property of the Trades Council. The district court preempted the jury's responsibility in making this finding of fact.

As discussed in Part I and II, *supra*, we believe sufficient evidence existed from which the jury could have inferred that the funds from Local 101 were "stolen, converted, or taken by fraud." It is undisputed that the funds from Local 101 were passed on to the Trades Council and to the International. Thus, sufficient evidence existed to support the jury's finding of guilt on Count X, and the district court erred in ordering acquittals for Long and Cantrell on Count X.

IV.

The district court also ruled that there was insufficient evidence to support Long or Cantrell's convictions on Count II for conspiring to embezzle funds from a union[4]. The court ordered acquittals because it concluded that no evidence of an agreement to commit an illegal act existed. Slip op. at 15 (citing

4 Long and Cantrell also argue that the Trades Council is not a "labor organization" for purposes of a violation of 29 U.S.C. § 501(c). Long and Cantrell raised this issue during trial. The district court stated that it appeared that the Trades Council is a "labor organization", as defined in 18 U.S.C. § 402(i) or (j), but that the issue was a "legal question dependent on a wide array of factual characteristics of the [Trades Council]." *United States v. Long*, No. 90-00116-01/03-CR-W-5, slip op. at 2, (W.D. Mo. Sept. 24, 1990). Count II charges the agreement to embezzle funds from Local 101 and not from the Trades Council, thus, the status of the Trades Council as a labor union in not critical.

United States v. Peyro, 786 F.2d 826, 829 (8th Cir. 1986)). The court observed that Long and Cantrell agreed only to reimburse the International for the $10,000 provided from the International's grant account, and that such a reimbursement did not amount to an illegal act. Slip op. at 15-16. The court reasoned that even assuming that the means by which Long intended to obtain the funds was illegal, there was no evidence from which it could be inferred that Cantrell agreed to or knew how Long would obtain the money. *Id.* at 16.

Cantrell and Long argue that the government's basis for sustaining their convictions on this count is based purely on circumstantial evidence, and that to sustain a conviction on purely circumstantial evidence, such evidence must not only be consistent with the defendant's guilt, but must also be inconsistent with innocence. *Cartello v. United States*, 93 F.2d 412, 414-15 (8th Cir. 1937). Long and Cantrell argue that since there was no direct evidence of a conspiratorial agreement and because the circumstantial evidence was consistent with innocence, the court correctly ordered acquittals on Count X.

Because a conspiratorial agreement is usually clandestine, it is frequently incapable of proof by direct evidence. *See United States v. Raymond*, 793 F.2d 928, 932 (8th Cir. 1986) (circumstantial evidence giving rise to a strong inference of agreement between participants is sufficient to establish a conspiracy). We held in *United States v. Jacobson*, 536 F.2d 793 (8th Cir.), *cert. denied*, 429 U.S. 864 (1976), that "circumstantial evidence does not fail simply because it may infer innocence as well as guilt." *Id.* at 796 (citing *Holland v. United States*, 348 U.S. 121, 139-40 (1954)).

We are persuaded that the totality of the evidence supports the jury's finding that a conspiratorial agreement to embezzle money from Local 101 existed. Long told Cantrell that the International must be reimbursed the $10,000 the Trades Coun-

cil received for the safety program. Cantrell received $3,500 as salary from the safety program in a period of less than three months, and there is little to establish what Cantrell did to earn this salary. Long told Cantrell that Local 101 would reimburse the International. If the International required the money to be reimbursed and Local 101 did not do so, then a jury could reasonably infer that the International would call on the Trades Council to reimburse the money. The membership of the Trades Council, other than Cantrell, knew nothing about the existence of the safety program, the existence of the separate bank account, or the depletion of the account by salary disbursements to Quick and Cantrell. A jury could reasonably infer that Cantrell had an interest in not paying back the money personally, and that Long did not wish for him to do so. This inference would allow a jury to conclude that Long and Cantrell agreed to obtain the funds from Local 101. Moreover, the sale of the Local 101 property for $10,000, and the transfer of the $10, 000 to the Trades Council also evidence an agreement to embezzle money from Local 101.

Sufficient evidence existed to support the jury's convictions on Count X, and thus, the district court erred in ordering acquittals on this count.

V.

Finally, the government argues that the district court erred in concluding that its failure to instruct the jury on the issue of single versus multiple conspiracies constituted a sufficient error to merit a new trial. Slip op. at 19. Although holding the issue moot because of its order of acquittals, the district court concluded that a "reasonable argument" existed that it had erred in refusing to submit two instructions (17 and 45) offered by the defendants to the jury, and that a new trial was warranted. *Id.* at 17.

The question of whether one or two conspiracies exists is a jury question. *United States v. Zimmerman*, 832 F.2d 454, 457 (8th Cir. 1987). Long and Cantrell argue that there was only one conspiracy, and that the court erred in refusing to instruct the jury on the issue of one versus two conspiracies. They argue that the second conspiracy count (Count II) alleged a conspiracy to conceal the acts alleged in the first conspiracy count (Count 1), and so, the two counts were multiplicitous. Finally, they assert that because they were acquitted on the first conspiracy, they must be acquitted on the second conspiracy.

The government argues that the district court erred in conditionally granting a new trial because the instructions Long and Cantrell offered (Instructions 17 and 45) did not submit the issue of a single versus multiple conspiracies.

Instruction 17[5] offered by defendants directed the jurors to: determine whether the conspiracy charge existed; identify the members of the conspiracy; and acquit any defendant not a member of the conspiracy. The district court covered the substance of this instruction by other instructions, (Inst. 15, 16,

5 The instruction provided:

Proof of several separate conspiracies is not proof of the single, over all conspiracy charged in the indictment unless one of the several conspiracies which is proved is a single conspiracy which the indictment charges. What you must do is determine whether the conspiracy charged in the indictment existed between two or more conspirators. If you find that no such conspiracy existed, then you must acquit. However, if you are satisfied that such a conspiracy existed, you must determine who are members of that conspiracy.

If you find that a particular defendant is a member of another conspiracy, not the one charged in the indictment, then you must acquit that defendant. In other words, to find a defendant guilty, you must find that he was a member of the conspiracy charged in the indictment and not some other conspiracy.

17, and 19), and thus, did not abuse its discretion in refusing the defendants' proposed instruction. *United States v. Brown*, 584 F.2d 252, 259 (8th Cir. 1978), *cert. denied*, 440 U.S. 910 (1979).

Instruction 45 read: "If you find the government has failed to prove the existence of only one conspiracy, you must find the Defendants not guilty." This instruction does not raise the issue of a single versus multiple conspiracies.

Long and Cantrell cite nothing in the instruction conference transcript showing that they requested an instruction on the issue of one versus two or more conspiracies. Nevertheless, the defense did raise the issue in a pre-trial motion to dismiss, and in any event, we are satisfied that the district court did not err in failing to charge the jury because the indictment and proof at trial consisted of two separate conspiracies. When the evidence does not support the giving of a multiple conspiracy instruction, the failure to do so is not error. *United States v. Davis*, 882 F.2d 1334, 1341-42 (8th Cir. 1989), *cert. denied*, 110 S.Ct. 1472 (1990).

In determining whether there is one conspiracy or two, the crucial concern "is the scope of the conspiratorial agreement, for it is that which determines . . . the duration of the conspiracy." *Grunewald v. United States*, 353 U.S. 391, 397 (1957). In *Grunewald*, the defendants obtained "no prosecution" rulings from the IRS by bribing IRS officials. *Id.* at 394-95. Subsequent activities of the conspirators were directed at concealing the irregularities in obtaining these rulings. *Id.* at 395. The Supreme Court concluded that subsequent concealment activities did not extend the conspiracy directed at obtaining the rulings, so as to bring those earlier activities within the statute of limitations period. *Id.* at 405.

In so ruling, the Supreme Court stated:

By no means does this mean that acts of concealment can never have significance in furthering a criminal conspiracy. But a vital distinction must be made between acts of concealment done in furtherance of the *main* criminal objectives of the conspiracy, and acts of concealment done after these central objectives have been attained, for the purpose only of covering up after the crime. Thus the Government argues in its brief that "in the crime of kidnapping, the acts of conspirators in hiding while waiting for ransom would clearly be planned acts of concealment which would be in aid of the conspiracy to kidnap. So here, there can be no doubt that . . . all acts of concealment, whether to hide the identity of the conspirators or the action theretofore taken, were unquestionably in furtherance of the initial conspiracy . . ." We do not think the analogy is valid. Kidnappers in hiding, waiting for ransom, commit acts of concealment in furtherance of the objectives of the conspiracy itself, just as repainting a stolen car would be in furtherance of a conspiracy to steal; in both cases, the successful accomplishment of the crime necessitates concealment. More closely analogous to our case would be conspiring kidnappers who cover their traces after the main conspiracy is finally ended — i.e., after they have abandoned the kidnapped person and then take care to escape detection. In the latter case, as here, the acts of covering up can by themselves indicate nothing more than that the conspirators do not wish to be apprehended — a concomitant, certainly, of every crime since cain attempted to conceal the murder of Abel from the Lord.

Id. at 405-06 (footnote omitted).

In determining whether one or two conspiracies exist for purposes of determining whether double jeopardy bars a prosecution, the two conspiracies are examined by comparing the: (1) time; (2) persons acting as co-conspirators; (3) offenses

charged; (4) overt acts; and (5) loci of the conspiracies. *United States v. Thomas*, 759 F.2d 659, 662 (8th Cir. 1985) (subsequent history omitted).

Applying these principles, we are convinced that the district court did not err in failing to charge the jury on the issue of one versus multiple conspiracies. The evidence conclusively established two separate conspiracies. The first conspiracy (Count I) involved Long, Cantrell, and Quick's obtaining money from the International and using those funds. The second conspiracy arose only after OSHA audited the International's grant account. The mere fact that the second conspiracy may have been motivated by a desire to conceal the first conspiracy does not in and of itself convert the two conspiracies into one. *Grunewald*, 353 U.S. at 402 ("Acts of covering up, even though done in the context of a mutually understood need for secrecy, cannot themselves constitute proof that concealment of the crime after its commission was part of the initial agreement among the conspirators.") Here, the two conspiracies were separated by time, and involved only two of the three same individuals. Although the statutory offenses charged were the same, the overt acts were different —Count I involved Long, Cantrell, and Quick obtaining funds from the International to set up a safety program, and Count II involved Long and Cantrell obtaining funds from Local 101 to reimburse the International. The underlying activities of both alleged conspiracies involved separate objectives and agreements. Accordingly, the district court erred in conditionally ordering a new trial.

We reverse and remand the case to the district court to enter judgments of convictions, and to proceed to sentence Long and Cantrell.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs. No. 90-00116-01/03-CR-W-5

SAM F. LONG, EDWARD E. QUICK and E. J. CANTRELL,

Defendants.

ORDER

Before this Court are the motions of defendants Cantrell and Long for judgment of acquittal, arrest of judgment and new trial. Each of these motions will be addressed individually below. Defendants' motion for arrest of judgment will be denied, defendants' motion for new trial will be denied as moot and defendants' motion for judgment of acquittal will be granted.

BACKGROUND

On June 14, 1990, a Grand Jury indictment was filed charging ten counts. Count One charges defendants Long, Quick and Cantrell with conspiracy to commit several offenses under 18 U.S.C. §§ 2314 and 2315 and 29 U.S.C. § 501(c) all in violation of 18 U.S.C. § 371. It alleges that the defendants conspired to obtain money from the International Union of Operating En-

gineers ("IUOE") in Washington, D.C., for a safety program to be operated under the auspices of Missouri State Building and Construction Trades Council ("MSBCTC). It also alleges that the program was never implemented and that no measurable work was done toward implementing the program.

Counts Three through Six of the indictment charge all defendants with transportation and receipt of checks moving between the IUOE and the MSBCTC. These funds were for the implementation of the safety program.

Count Seven charges all defendants with embezzling the above-mentioned funds from the MSBCTC.

Count Two charges defendants Long and Cantrell with a separate conspiracy to commit other offenses under 19 U.S.C. § 501(c) and 18 U.S.C. § 2314. It alleges a conspiracy to pay back the IUOE funds which, as a result of an Occupational Safety and Health Administration ("OSHA"), needed to be returned to the IUOE's grant account. Defendants Long and Cantrell allegedly conspired to embezzle funds from Local Union 101 to obtain the funds to be returned to the IUOE.

Count Eight charges defendants Long and Cantrell with embezzling assets consisting of display boards and a carrying case from Local Union 101.

Count Nine charges defendants Long and Cantrell with embezzling $10,000.00 from Local Union 101 for the purpose of transferring that sum to the MSBCTC.

Count Ten charges defendants Long and Cantrell with transporting in interstate commerce a check in the amount of $10,000.00 while knowing the check to be stolen, converted or taken by fraud. This count is based on the transfer of funds

from the MSBCTC to the IUOE.

The jury returned a verdict finding defendant Quick not guilty on all counts under which he was charged. The jury found defendants Long and Cantrell not guilty on Counts One, Three, Four, Five, Six, Seven and Eight and guilty on Counts Two, Nine and Ten.

The following evidence was adduced at trial.

Defendant Long, at the pertinent times, was President and Business Manager of Local Union 101. Defendant Cantrell was President of the MSBCTC and a representative to the Missouri legislature. Defendant Quick was a Senator in the Missouri legislature. Local Union 101 is a member of both the IUOE and the MSBCTC.

In early 1985 the Director of Safety and Health for the IUOE, at the direction of the President of the IUOE, discussed with defendant Long the possibility of the IUOE providing funds for a safety program in Missouri. After some further discussions between the defendants and between other parties, the IUOE sent two checks, each in the amount of $5,000.00, to the MSBCTC safety program. The checks were dated December 15, 1985, and February 17, 1986, and were sent to defendant Long.

Defendant Long forwarded the checks to defendants Quick and Cantrell, who opened a checking account under the name of Missouri State Building and Construction Trades Safety Program. Funds from the Safety Program checking account were used to pay the salaries of defendants Quick and Cantrell as director and administrator of the Safety Program.

By April of 1986, the funds provided by the IUOE were all

but depleted. No further funding was obtained, and the Safety Program checking account was closed. What little money remained was deposited in a MSBCTC account. Checks totalling the amount deposited were issued to defendants Quick and Cantrell.

Subsequent to these events, OSHA audited the IUOE grant account from which IUOE provided the checks for the MSBCTC safety program. OSHA concluded that these transactions should be disallowed because they were not included as a line item of the IUOE grant.

On being notified of this disallowance, the IUOE Director of Safety and Health called defendant Long and told him that the money would have to be returned. Defendant Long told the IUOE Director that he would see to it that the money was returned.

Defendant Long then called defendant Cantrell and asked that the money be returned to the IUOE. Defendant Cantrell informed defendant Long that the funds had been depleted. Defendant Long told defendant Cantrell that Local 101 would provide the funds to be returned to the IUOE. Defendant Long then informed the IUOE Director of Safety and Health that the MSBCTC did not have funds to reimburse the $10,000.00 but that he would find a way to provide that money.

Defendant Long then arranged to sell a model crane and assorted display boards and materials to an independent safety consultant, a Mr. Jorgensen. The display boards and a carrying case for the model crane had been purchased with Local Union 101 funds. The model crane and accompanying materials had been put together following a crane collapse in Kansas City, Missouri, in August of 1985.

The model crane was used by defendant Long and others in a successful attempt to persuade OSHA to reverse a determination that the crane had collapsed because of operator error. These materials were later used by defendant Long in a presentation at a safety conference. At the time defendant Long arranged for their sale, they were being stored in various rooms at Local Union 101's offices.

These materials were sold by defendant Long to Mr. Jorgensen for $6,200.00. Defendant Long subsequently sold Mr. Jorgensen additional materials for $3,800.00.

The checks received from Mr. Jorgensen were deposited into a Local Union 101 checking account. On July 21, 1987, defendant Long directed the Local Union 101 bookkeeper to issue a check in the amount of $10,000.00 made payable to the MSBCTC, which she did. The check was then signed by defendant Long and signature stamped with the signature stamp of the Local Union 101 treasurer.

Bundles of Local Union 101 checks were introduced at trial. Many of these checks were signed by defendant Long and signature stamped with the treasurer's name. Similarly, many of the checks were signed by the Local Union 101 treasurer and signature stamped with defendant Long's name. At least one check was signature stamped with both the president's and the treasurer's names.

On July 22, 1987, defendant Cantrell's secretary received the Local Union 101 check and deposited it into the MSBCTC checking account. At the direction of defendant Cantrell, a check in the amount of $10,000.00 was then issued by MSBCTC to the order of the IUOE and sent to the IUOE's offices.

Motion for Judgment of Acquittal

Defendants Long and Cantrell move for judgment of acquittal on several different grounds. These grounds will be discussed separately below.

Insufficient Evidence

The standard under which this Court reviews the sufficiency of the evidence in a criminal case has recently been summarized by the Eighth Circuit:

> The defendant's conviction must be upheld if, after viewing the evidence in the light most favorable to the government, there is substantial evidence to support the jury's verdict. In reviewing the guilty verdict, we must give the government the benefit of all inferences that may be reasonably drawn from the evidence. The evidence need not exclude every reasonable hypothesis of innocence, but must simply be sufficient to convince the trier of fact beyond a reasonable doubt that the defendant is guilty. If the evidence rationally supports two conflicting hypotheses, the reviewing court will not disturb a conviction. Moreover, the . . . court must keep in mind that the standard to be applied to determine the sufficiency of the evidence is a strict one, and the finding of guilt should not be overturned lightly.

United States v. Schubel, 912 F.2d 952, 955 (8th Cir. 1990) (citations omitted).

Substantial portions of the parties' briefs are devoted to an analysis of the facts relevant to all of the counts for which the

defendants were indicted. As the jury found that each defendant was not guilty on all counts except Counts Two, Nine and Ten, this Court believes it more appropriate to apply the above standard to the evidence which is material to these latter counts. This is so particularly since it is the government's contention that the counts on which the jury found defendants Long and Cantrell guilty involve a separate and distinct conspiracy.

The crux of defendants' contentions centers on Count Nine of the indictment. Under Count Nine, defendant Long is charged with "embezzling, stealing or unlawfully and willfully abstracting or converting the moneys, funds propertys and assets of a labor organization" in violation of 29 U.S.C. § 501(c).

Defendants argue, in part, that "lack of authorization" and "lack of benefit to the union" are essential elements to this crime. Because the government did not produce sufficient evidence as to these elements, defendants contend, defendants must be acquitted of this charge. This Court does not agree.

The Eighth Circuit has reviewed at length the issue of whether lack of benefit to the union is an essential element to a charge under § 501(c). *United States v. Goad*, 490 F.2d 1158, 1161-1165 (8th Cir. 1974). It concluded that "[i]f the Government establishes fraudulent intent and lack of proper authorization, it should not also be saddled with an additional burden of proving lack of benefit to the union." *Goad*, 490 F.2d at 1165. This conclusion, however, was not without some qualifications. The *Goad* court narrowed the application of this rule by finding that "lack of union benefit need [not] be established when the funds are *unauthorizedly* expended...." *Id.* (emphasis in original).

This decision explicitly left unanswered whether a union official violates § 501(c) "when the members themselves have authorized union officials to expend union funds for non-union purposes." *Goad*, 490 F.2d at 1166.

Although the Eighth Circuit has not yet found it necessary to answer this latter issue, it has been confronted with a similar question. In *United States v. Welch*, union officials were charged with violations of § 501(c) when they, as members of the union executive board, passed resolutions granting vacation and severance pay to themselves and others in accordance with the union's constitution and by-laws. 728 F.2d 1113, 1117 (8th Cir. 1984).

In discussing the essential elements of a § 501(c) violation, the court found that "[u]nion authorization, however, does not completely insulate defendants from the reach of section 501(c)." *Welch*, 728 F.2d at 1117. The court went on to discuss the tests developed and elements required in other circuits concerning alleged violations of § 501(c). Without explicitly deciding what type of authorization, if any, would be a defense to a § 501(c) charge, the court concluded that "under any test, union officials violate section 501(c) only when they possess fraudulent intent to deprive a union of its funds." *Welch*, 728 F.2d at 1118.

In developing an appropriate verdict directing instruction for Count Eight, this Court concluded that the *Welch* opinion indicated that union authorization was not an essential element to a § 501(c) charge. While the third element in this instruction does say that the jury must find that defendant "Long, without authorization, embezzled, stole, or unlawfully and willfully abstracted or converted to his own use or the use of another, the moneys, funds, property and assets of Local 101," this Court did not mean to indicate that lack of authori-

zation was an essential element. Rather, because the government charged in the indictment and elicited evidence at trial that defendant Long lacked authorization, this Court concluded that such allegation should be part of the instruction.

This Court's reading of *Welch*, that lack of authorization is not an essential element, is similar to interpretations by other circuits. The Fourth Circuit, for example, found that the Eighth Circuit in *Welch* "abandoned the distinction between "authorized" and "unauthorized" expenditures and hold[s] that an expenditure or appropriation violates § 501(c) if the defendant acted with 'fraudulent intent.'" *United States v. Stockton*, 788 F.2d 210, 215 (4th Cir. 1986). Similarly, the Seventh Circuit found that *Welch* stands for the proposition that "authorization (or lack of) for the act is but one factor bearing on intent, as is proof that the union reaped no benefit from the act." *United States v. Floyd*, 882 F.2d 235, 240 (7th Cir. 1989).

In reviewing the sufficiency of the evidence, whether or not the Union benefitted from defendant Long's acts and whether or not defendant Long's acts were authorized by the Union are neither one decisive on the issue of whether defendant Long violated § 501(c). Rather the presence or absence of these facts go to the weight of the evidence of fraudulent intent.

Welch, in addition to its determination that authorization is not a complete defense to a § 501(c) violation, indicates clearly the fraudulent intent necessary for a conviction under § 501(c):

> Section 501(c) does not hold union officials strictly liable for misuse of union funds. By its very terms, the statute holds union officials criminally liable only when they embezzle, steal, or *unlawfully* and *willfully* abstract or convert to their own use or the use of others the funds of the

> union. To prove "willfullness" under section 501(c), the government must show that the union officials possessed fraudulent or criminal intent to deprive the union of funds.

Welch, 728 F.2d at 1116 (citations omitted; emphasis in original). "Willfullness" under § 501(c), the court explains, "is proved by showing that defendant 'was sufficiently aware of the facts to know that he was acting wrongfully and in contravention of the trust placed in him by the union and its members." *Welch*, 728 F.2d at 1116 (quoting *United States v. Belt*, 574 F.2d 1234, 1238 (5th Cir. 1978)). As stated in *Goad*, "willfulness" is frequently defined as an "'act (or omission) . . . committed (or omitted) by defendant voluntarily, with knowledge that it was prohibited by law, and with the purpose of violating the law, and not by mistake, accident or in good faith.'" *Goad*, 490 F.2d at 1166, n. 10.

This Court has reviewed the entire transcript of evidence presented at trial. It is undisputed that the $10,000.00 check issued by Local Union 101 was issued for the purpose of reimbursing the IUOE. It is also undisputed that this money was reimbursed to the IUOE at the IUOE's request. Neither defendant Long nor defendant Cantrell received any portion of the money sent to IUOE via the MSBCTC.

The government places great significance on defendants' fiduciary' responsibilities and the lack of dissemination to Union members of the particulars of the $10,000.00 transaction. It also finds the lack of explicit pre-authorization by the Local Union 101 executive board or membership to be a significant indication of fraudulent intent.

This Court cannot agree. The $10,000.00 transaction may not have followed the precise duties language of the constitu-

tion and by-laws of Local Union 101, particularly as interpreted by the government. However, the evidence shows that the means of accomplishing this transaction, and the means of recording it in Local Union 101 records, were exactly the same means used for every Local Union 101 financial transaction.

There was no evidence presented that defendant Long attempted to hide, coverup or conceal the means by which he effected a reimbursement to the IUOE from Local Union 101. There was no evidence that the means of accomplishing this transaction were in the least bit unusual.

In isolation, the $10,000.00 transaction on which Count Nine is based may be viewed to imply an ulterior motive in that it did not precisely comply with the procedures prescribed by the Local Union 101 constitution and by-laws. Fraudulent intent, however, must be determined "on the basis of 'all the evidence considered together' and in light of 'all the surrounding circumstances.'" *Welch*, 728 F.2d at 1119 (quoting *Morissette v. United States*, 342 U.S. 246, 275-76, 72 S.Ct. 240, 256 (1952). Where, as here, there is no evidence that the means of effecting the complained-of transaction differed from the usual means of effecting transactions, such means cannot be used to infer fraudulent intent.

The government also suggests that the $10,000.00 reimbursement to IUOE implies a fraudulent intent because Local Union 101 had no legal, ethical or moral obligation to make such a reimbursement. While it is true that Local Union 101 had no legal obligation to make the reimbursement, it is also true that no entity other than IUOE had such an obligation. It was the IUOE, after all, that was found to have made the disbursement in contravention to OSHA requirements.

Additionally, this Court cannot agree that Local Union 101

had no ethical or moral obligation to reimburse the IUOE. Local Union 101, through defendant Long, played a role in obtaining the IUOE funds for the Safety Program. It is also a member of the IUOE as well as the MSBCTC. It had at least a moral interest in the reputation and well-being of both organizations.

In sum, there is not sufficient evidence to show that defendant Long possessed fraudulent intent in directing the issuance of a check from Local Union 101 for the reimbursement to the IUOE. Because fraudulent intent is an essential element for a § 501(c) violation, judgment of acquittal must be granted on Count Nine in favor of defendant Long.

Additionally, judgment of acquittal must be granted in favor of defendant Cantrell on this Count. Defendant Cantrell is charged with aiding and abetting defendant Long in the commission of a § 501(c) violation. While a defendant may be found guilty of aiding and abetting though the principal is acquitted, *Standefer v. United States*, 447 U.S. 10, 20, 100 S.Ct. 1999, 2006 (1980), to be guilty "he must share in the principal's essential criminal intent," *United States v. Lard*, 734 F.2d 1290, 1298 (8th Cir. 1984). As there is insufficient evidence to show that defendant Long possessed the requisite fraudulent intent, defendant Cantrell cannot be found guilty either.

Moreover, there is no evidence that defendant Cantrell knew more than that defendant Long was going to attempt to acquire the funds to reimburse the IUOE. There was no evidence that defendant Cantrell knew the means by which defendant Long would obtain the funds. To be found guilty of aiding and abetting, a defendant must "'in some sort associate himself with the venture, that he participate in it as something he wishes to bring about, that he seek by his actions to make it succeed." *Lard*, 734 F.2d at 1298 (quoting *Nye & Nissen v. United*

States, 336 U.S. 613, 619, 69 S.Ct. 766, 770 (1949).

As with Count Nine, there is insufficient evidence to support a conviction of either defendant on Count Ten of the indictment. Count Ten charges that the defendants caused the check from the MSBCTC to the IUOE to move across a state line knowing that the check had been stolen, converted or taken by fraud.

The evidence at trial established only that defendant Long sent a check from Local Union 101 to the MSBCTC for the sole purpose of the MSBCTC sending the funds on to the IUOE. This was done so at the direction of defendant Cantrell. Defendant Cantrell knew the purpose of the check from Local Union 101 and accomplished that purpose. That the Local Union 101 check was first deposited in an MSBCTC account does not make those funds the property of the MSBCTC. In fact, had the MSBCTC done anything but reimburse the IUOE with these funds, the MSBCTC does not charge an offense or if the court was without jurisdiction of the offense charged." This Court has reviewed defendants' suggestions in support of their motions and finds nowhere an argument for lack of jurisdiction. This Court of its own search of the record finds that it has jurisdiction over the defendants and that the indictment does charge criminal offenses. For this reason, defendants' motion for arrest of judgment will be denied.

Motion for New Trial

As discussed above, this Court believes that its failure to instruct the jury on the issue of a single conspiracy or multiple conspiracies is sufficient error to merit the grant of a motion for new trial. This Court, however, in granting defendants' motion for judgment of acquittal has rendered this issue moot.

Conclusion

A review of the record in the instant case reveals that there is insufficient evidence to support the jury's verdicts of guilty on Counts Two, Nine and Ten for defendants Long and Cantrell. For this reason, it is therefore

ORDERED that defendants' motion for judgment of acquittal is granted. It is further

ORDERED that defendant Sam F. Long is acquitted of the charges in Counts Two, Nine and Ten of the indictment. It is further

ORDERED that defendant Elmer J. Cantrell is acquitted of the charges in Counts Two, Nine and Ten of the indictment. It is further

ORDERED that defendants' motion for arrest of judgment is denied. It is further

ORDERED that defendants' motion for new trial is denied as moot.

/s/ SCOTT 0. WRIGHT
United States District Judge

December 5, 1990

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-3577WMKC

United States of America,
Appellee,

vs.

Elmer J. Cantrell,
Appellant.

Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

No. 92-3581WMKC

United States of America,
Appellee,

vs.

Sam F. Long,
Appellant.

The suggestion for rehearing en banc is denied. The petition for rehearing is also denied.

September 7, 1993

Order Entered at the Direction of the Court:

\s\ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

INSTRUCTION NO. 25

The crime of embezzling, stealing or unlawfully and willfully abstracting or converting the moneys, funds, property and assets of a labor organization as charged in Counts Eight and Nine of the Indictment has four essential elements, which are:

> *One,* that Local 101, Hoisting and Portable Engineers, AFL-CIO, was a "labor organization" engaged in an industry affecting commerce.

Two, that the defendant, Sam F. Long, was either an "officer" of or was "employed directly or indirectly" by Local 101, Hoisting and Portable Engineers, AFL-CIO;

Three, that defendant Sam F. Long, without authorization, embezzled, stale, or unlawfully and willfully abstracted or converted to his own use or the another, the moneys, funds, property and assets use of Local 101, Hoisting and Portable Engineers, AFL-CIO; and

Four, that defendant Sam F. Long acted with fraudulent intent to deprive Local 101, Hoisting and Portable Engineers, AFL-CIO, of its money, funds, property and assets.

For you to find a defendant guilty of the crime charged under Counts Eight and Nine, the government must prove all of these essential elements beyond a reasonable doubt as to that defendant otherwise you must find that particular defendant not guilty of this crime under Counts Eight and Nine.